Table of Contents.

Statement of the case	1
Questions presented	2
Reasons for granting the motion to dismiss	3
The appeal does not present a substantial Federal question	3
A. The authorization to present evidence to grand jury is not improper	3
B. The resolve does not constitute a bill of attainder	6
C. The resolve is not unduly vague	8
Conclusion	10

Table of Authorities Cited.

Cases.

Ashwander v. Tennessee Valley Authority, 297 U.S. 288	7
Barenblatt v. United States, 360 U.S. 109	9
Barrows v. Jackson, 346 U.S. 249	6
Cawley v. Warren, 216 F. 2d 74	5
Cummings v. Missouri, 4 Wall. 277	7
Department of Banking of Nebraska v. Pink, 317 U.S. 264	6
Detroit, City of, v. Division 26 of Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, 332 Mich. 237, 51 N.W. 2d 228; app. dis. 344 U.S. 805, 73 S. Ct. 37	7
Flemming v. Nestor, 363 U.S. 603; reh. den. 364 U.S. 854	8

Frisbie v. United States, 157 U.S. 160 5

Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 8

Guaranty Trust Co. v. Blodgett, 287 U.S. 509 5

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 7

Kilbourn v. Thompson, 103 U.S. 168 9

Kingsley International Pictures Corp. v. Regents of the University of New York, 360 U.S. 684 5

McAuliffe v. Mayor & Board of Aldermen of New Bedford, 155 Mass. 216 7

McGrain v. Daugherty, 273 U.S. 135 9

Mergenthaler Linotype Co. v. Davis, 251 U.S. 256 5

Sheridan v. Gardner, 1964 Mass. Adv. Sh. 229 4

United States v. Lovett, 328 U.S. 303 7

United States v. Smyth, 104 F. Supp. 283 5

Watkins v. United States, 354 U.S. 178 9

STATUTES, ETC.

U.S. Constitution, Fourteenth Amendment 2, 3, 8

28 U.S.C.
§ 1257 6
§ 1257(2) 5
§ 1257(3) 5

Resolves of 1962, c. 146 1, 3

Supreme Court of the United States.

October Term, 1964.

No. 612.

EDMUND C. SHERIDAN, *Appellant*,

v.

ALFRED GARDNER ET AL., *Appellees*.

ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS.

MOTION TO DISMISS BY APPELLEE EDWARD W. BROOKE, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

Now comes the Attorney General of the Commonwealth of Massachuse ts and moves that this appeal be dismissed on the ground that said appeal does not present a substantial federal question.

Statement of the Case.

The respondents are duly appointed members of the Commission created by chapter 146 of the Resolves of 1962 of the Commonwealth of Massachusetts (hereinafter called the Resolve) and attorneys retained by them to carry out the purposes set forth in the Resolve. Pursuant to authority granted in the Resolve, the respondents issued a summons to the petitioner to appear on September 16,

1963, and give testimony before the Commission and to bring with him certain records.

The date of the appearance was continued until October 10, 1963, by agreement.

On October 9, 1963, the petitioner filed a petition for a declaratory judgment as to the validity of the summons and for a temporary restraining order enjoining the respondents from requiring the attendance of the petitioner at any hearing or meetings. A temporary restraining order issued, and the case was reported to the Supreme Judicial Court of Massachusetts by the Superior Court.

On February 6, 1964, the Supreme Judicial Court filed an opinion (pp. 1a-13a of Jurisdictional Statement) directing the Superior Court to vacate the preliminary injunction and to enter a declaratory judgment in accordance with the opinion. The final decree of the Superior Court appears at pp. 14a-16a of the Jurisdictional Statement.

Questions Presented.

1. Is the due process clause of the Fourteenth Amendment violated by compelling a person to testify before a state legislative commission which is authorized to turn over evidence it receives to a grand jury, and which, in an interim report, has observed that its proposed remedial legislation will be more likely to be favorably received if preceded by convictions?

2. Does the exclusion from membership on a legislative commission, established to investigate organized crime and corrupt practices in government, of persons convicted of felonies and misdemeanors involving moral turpitude, and members of their immediate families, together with holders of public office and members of political committees, constitute a bill of attainder?

3. Is a subpoena which directs a person summoned before a duly constituted legislative committee to testify concerning "the existence and extent of corrupt practices in government at state and local levels with particular reference to the deposit of funds of [three named state agencies] with [a named banking institution]" void for excessive vagueness under the due process clause of the Fourteenth Amendment?

Reasons for Granting the Motion to Dismiss.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. The Authorization to Present Evidence to Grand Jury is Not Improper.

The appellant contends that the due process clause of the Fourteenth Amendment is violated by (*a*) the authorization of the Commission to "present" evidence to a grand jury, and (*b*) the statement in the Commission's interim report referring to potential convictions.

The appellant maintains that he would be deprived of due process if he were compelled to appear before a state legislative commission which is authorized to "present" evidence to a grand jury, and which, in one of its interim reports, observed that its ultimate recommendations for remedial legislation would carry more weight if they were preceded by convictions.

The Resolve establishing the Massachusetts Crime Commission (chapter 146 of the Resolves of 1962) provides, in part, as follows:

> "Upon order of the commission its counsel shall present to a grand jury for its action, or submit to the attorney general, a district attorney or other law en-

> forcement agency, such evidence which has come to the attention of the commission as in the opinion of the commission warrants such presentation or submission."

In the instant case no "presentation" of evidence to any grand jury ever took place. The appellant was simply summoned to testify before the Commission, and any prediction as to the ultimate referral of such testimony to a grand jury must be purely speculative. That such conjecture at this stage of the proceedings is entirely premature is reflected in the opinion of the Massachusetts Supreme Judicial Court, wherein the following dictum is to be found:

> "(a) The plaintiff argues that this provision authorizes the commission by its counsel to go before the grand jury in person, and that this would be in violation of art. 12 of the Declaration of Rights. The record in this suit does not show that its counsel has done so or that there has been any such order of the commission. Until a case presenting this issue comes before us we shall not undertake to evaluate in its context the precise meaning of the word 'present.' Should we at that time be of opinion that such an appearance is apparently authorized, and should we also be of opinion that such authorization would be contrary to some constitutional provision, it would then become our duty, if possible, so to construe the resolve as to avoid reasonable constitutional doubts. *Opinion of the Justices,* 330 Mass. 713, 726. *Commonwealth* v. *Benoit* [1964 Mass. Adv. Sh. 221, 225], and cases cited. *United States* v. *Rumely,* 345 U. S. 41, 45-47."
>
> *Sheridan* v. *Gardner,* 1964 Mass. Adv. Sh. 229, 236.

This court has often said that a state court's views upon the construction of state statutes are completely non-reviewable by the Supreme Court, and that, where the validity of a state statute has been sustained in the face of federal objections, the Supreme Court on appeal must accept the state court's construction of the statute. *Guaranty Trust Co.* v. *Blodgett*, 287 U.S. 509, 513. *Kingsley International Pictures Corp.* v. *Regents of the University of New York*, 360 U.S. 684, 688. In the instant case the state court has expressly declined to construe the statute to mean that the Commission may itself, by its counsel, go before the grand jury—which construction is now urged by the appellant. But, even if the Massachusetts court had undertaken to construe the language of the Resolve as does the appellant, no substantial federal question would be presented. Under federal law, as well as under the law of most states, a grand jury is permitted to hear evidence from any source. *Frisbie* v. *United States*, 157 U.S. 160, 163. *United States* v. *Smyth*, 104 F. Supp. 283, 295, 297. *Cawley* v. *Warren*, 216 F. 2d 74, 76.

In taking an appeal under Title 28, Section 1257(2), as distinguished from seeking certiorari under Section 1257(3), only the question of the validity of a particular state statute under federal law can be raised. Where, as here, the appellant argues that, because of some extrinsic circumstance, his federal rights prevent application of the state statute to him, an adverse decision amounts to a denial of his assertion of federal rights, rather than a validation of the state statute, and review can be had in the Supreme Court only by way of certiorari. *Mergenthaler Linotype Co.* v. *Davis*, 251 U.S. 256, 259. Accordingly, insofar as the appellant seeks to have this court review his claim that the Commission's interim report referring to possible prosecutions renders his compelled appearance before the

Commission violative of due process, he has chosen the wrong remedy.

But, even under certiorari, the appellant would lack standing to obtain review on this issue. Title 28, Section 1257, authorizes review only of "final judgments or decrees." This court has construed that language as requiring that the record show ". . . that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Department of Banking of Nebraska* v. *Pink*, 317 U.S. 264, 268. In the court below the question of whether the appellant's federal rights would be violated by virtue of some subsequent presentation of his testimony to a grand jury was expressly left open for future determination, should the situation ever arise.

B. The Resolve does Not Constitute a Bill of Attainder.

The appellant contends that the Resolve constitutes a bill of attainder by virtue of the fact that persons and members of the immediate families of persons who have been convicted of felonies, gaming offenses and misdemeanors involving moral turpitude, together with public officers and members of political committees, are excluded from membership on the Committee.

The appellant does not allege that he is himself within the category of excluded persons, in the absence of which allegation he has no standing to complain. *Barrows* v. *Jackson*, 346 U.S. 249. This court has often said that one cannot challenge the constitutionality of a statute unless he can show that he is within the class whose constitutional rights are allegedly infringed, even though he will suffer a direct and substantial injury from the application of the statute. See cases collected in *Barrows* v. *Jackson*, 346 U.S. 249, 256. The principle that one may not claim stand-

ing to vindicate the constitutional rights of third persons is both a matter of jurisdiction, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 149-154 (concurring opinion), and a firmly established self-imposed guideline adopted by this court to avoid hypothetical advisory opinions. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-348.

But, over and above the matter of standing, the appellant's position on this point is fatally defective on its merits. The two indispensable prerequisites to a bill of attainder are (*a*) a declaration of guilt of either the individual or the class to which he belongs, and (*b*) the imposition of punishment, in the sense appropriate for bills of attainder. *United States* v. *Lovett*, 328 U.S. 303, 324. Neither of these essential elements is to be found in the Resolve.

The Massachusetts legislature has omitted from the Resolve ". . . any condemnation for which the presumed punishment was a sanction. Thereby it negatived the essential notion of a bill of attainder." *Lovett, supra*, at p. 326. In this respect the Resolve is clearly distinguishable from the case of *Cummings* v. *Missouri*, 4 Wall. 277, relied upon by the petitioner, wherein refusal to take a specified oath was by statute deemed to be an admission of guilt.

Similarly, the element of punishment is manifestly lacking, in the absence of any provision for fine, imprisonment or deprivation of a vested right. *City of Detroit* v. *Division 26 of Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America*, 332 Mich. 237, 51 N.W. 2d 228, appeal dismissed 344 U.S. 805, 73 S. Ct. 37. There is no "vested right" to be employed in governmental service. *Ibid.*, 332 Mich. 237, 51 N.W. 2d 228, 232. See also dictum of Holmes, J., in *McAuliffe* v. *Mayor & Board of Aldermen of New Bedford*, 155 Mass. 216, at 220. ("The petitioner may have a constitutional right to

talk politics, but he has no constitutional right to be a policeman").

In the case of *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716, cited by the appellant, this court held that an act requiring public servants to take a loyalty oath was not a bill of attainder, because it imposed no punishment.

> "We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment." (P. 722.)

The court went on to observe that the constitutional guaranties against bills of attainder "were not intended to preclude legislative definition of standards of qualification for public or professional employment" (341 U.S. at 722).

In the instant case it is apparent from looking at the categories of excluded persons that the principal, if not the sole, legislative concern was to establish and maintain the integrity and objectivity of the Commission. This court has held that where, as here, the focus of concern is the activity or status from which the individual is barred, as distinguished from the person or class of persons disqualified, the disqualification is not "punishment." *Flemming* v. *Nestor*, 363 U.S. 603; rehearing denied, 364 U.S. 854.

C. The Resolve is Not Unduly Vague.

The appellant contends that the terms "organized crime" and "corrupt practices," used to define the scope of the Commission's investigation, are too vague under the due process clause of the Fourteenth Amendment.

Under the terms of the Resolve, the Commission was authorized to investigate and study as a basis for legislation "the existence and extent of organized crime within the commonwealth and corrupt practices in government at state and local levels . . ." In the instant situation the appellant was subpoenaed to give evidence and produce documents "relating to the existence and extent of corrupt practices in government at state and local levels in the Commonwealth," with particular reference to "the deposit of funds of [three named state agencies] with [a named banking institution]." The appellant was not called upon to testify concerning "organized crime."

There can be no disputing the right of a legislative body to conduct an investigation in aid of the legislative function. *Kilbourn* v. *Thompson*, 103 U.S. 168, 189. This court has determined that an inquiry into governmental departments "to expose *corruption*, inefficiency or waste" (emphasis added) is a proper subject for such legislative investigation, *Watkins* v. *United States*, 354 U.S. 178, 187, and that, when the inquiry is directed at the operations of a government agency, or the work of a government official, its scope cannot be restricted. *McGrain* v. *Daugherty*, 273 U.S. 135. The scope of the power of inquiry is as far-reaching as the potential power to enact and appropriate under the Constitution. *Barenblatt* v. *United States*, 360 U.S. 109, 111. That scope, in the instant case, has not been exceeded by either the language of the Resolve or the narrower terminology defining the area within which the appellant was called upon to testify.

In any event, the appellant's attack is surely premature. He has not yet appeared at a hearing. He has not yet been asked a single question. At such time as he does appear, he will have an opportunity to challenge the propriety of any question which he may be asked.

Conclusion.

On the basis of the foregoing it is submitted that no substantial question of law is presented by this appeal, and that the appeal should be dismissed.

Respectfully submitted,

EDWARD W. BROOKE,
Attorney General of the
Commonwealth of Massachusetts.

WARREN K. KAPLAN,
Special Assistant Attorney General.

MICRO CARD 22
TRADE MARK ®

MATTHEW BENDER & COMPANY

PC 66

59-5

microcard